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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No.———

BERT CHARLES BOWKER, PETITIONER,

v.

WALTER A. HUNTER, WARDEN OF THE UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Bert Charles Bowker, respectfully petitions the Honorable the Supreme Court of the United States for a writ of certiorari directed to the United States Circuit Court of Appeals for the Tenth Circuit to review the Judgment of said Court affirming the judgment of the District Court of the United States for the District of Kansas.

OPINIONS BELOW.

Opinion of the District Court (R. 43-48). Opinion of the Circuit Court of Appeals (R. 51-53) 158 F. 2d 854.

JURISDICTIONAL STATEMENT.

Decision of the Tenth Circuit Court of Appeals, January 15, 1947, 158 F. 2d 854; April 14, 1947, order by Mr. Justice Rutledge extending time to file petition for certiorari to May 16, 1947.

The Court has jurisdiction under Section 240 of the Judicial Code, Title 18, U. S. Code 347; and *Waley v. Johnston,* 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302; *Walker v. Johnston,* 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830.

Petitioner is held by a void judgment and sentence and thereby deprived of liberty without due process and in violation of the Fifth Amendment to the Constitution. Neither this court nor any of the lower courts have heretofore held that separate counts under Section 2 of the Mann Act, each referring to the same date, same woman, same transportation by automobile, same points of origin and destination, states more than a single offense.

The record presents a question of statutory construction pertaining to Section 2 of the Mann Act, Title 18, U. S. Code 398. The question is limited to said action.

Public policy in administration and enforcement of Federal Criminal Law is involved.

Decision in the present case conflicts with the decisions of several circuits that transportation is the gist of the offense defined.

Does the Federal Probation Law, Title 18, U. S. Code 724, for a single offense authorize probation following a term of imprisonment, is also involved.

The trial court had power to free petitioner from his unlawful imprisonment and its denial of power, approved by Circuit Court although not specifically decided, is in conflict with decision of this Court.

THE QUESTIONS PRESENTED.

Unlawful imprisonment resulting from sentence imposed after expiation for the single offense charged. Relief by habeas corpus.

An indictment in five counts drawn under Section 2 of the Mann Act, 18 U. S. Code 398, and limited to said section by reason of charging transportation by automobile, all of said counts referring to the same date, same woman, same means of transportation, same points of origin and destination, states a single offense.

Where a single offense is stated as set out above, a Federal District Court cannot impose a sentence to a term of imprisonment followed by probation. The Probation Law, Title 18, U. S. Code 724, does not permit it. And after service of the imprisonment, court exceeded its jurisdiction when it imposed a further term of imprisonment.

The further term of imprisonment under the circumstances given above exceeded jurisdiction of the court, violated the constitutional rights of the accused and was void. Habeas corpus was available to question the legality of the imprisonment.

A prisoner held under two commitments, one of which is based upon a judgment invalid or void, who has served in full the imprisonment fixed in the valid commitment, is entitled to be discharged from custody by habeas corpus.

STATEMENT OF MATTER INVOLVED.

Petitioner was charged by indictment filed March 6, 1940, (R. 14-18), in the United States District Court for the Western District of Louisiana, Shreveport Division, with violation of one section of the Mann Act, Title 18, U. S. Code, Section 398. Indictment contained five counts, all referring to same date, same woman transported, same means of transportation, and described the same transportation.

COUNT 1, that on or about the 9th day of February, 1940, in the Parish of Caddo, State of Louisiana, this petitioner did "transport and cause to be transported in inter-state commerce from Billings in the state of Montana via Leadville, Colorado, to Shreveport, in the Parish of Caddo, State of Louisiana, via an automobile running over the public highways of the United States, a woman, namely Mrs. Bert Charles Bowker" for the purpose of prostitution, etc.;

COUNT 2, that on or about the 9th day of February, 1940, in the Parish of Caddo, State of Louisiana, this petitioner did procure and obtain a form of transportation, namely, an automobile whereby the said woman was transported.

COUNT 3, that on or about the 9th day of February, 1940, in the Parish of Caddo, State of Louisiana, this petitioner did transport and cause to be transported, and aid and assist in obtaining transportation for and in transporting via automobile the said woman.

COUNT 4, that on or about the 9th day of February, 1940, in the parish of Caddo, State of Louisiana, this

petitioner did aid and assist in obtaining transportation for and in transporting via an automobile, the said woman.

COUNT 5, that on or about the 9th day of February, 1940, in the Parish of Caddo, State of Louisiana, this petitioner did transport and cause to be transported and aid and assist in obtaining transportation for and in transporting via automobile the said woman.

June 21, 1940, petitioner was tried before a jury and found guilty as charged. On Count 1, sentenced to serve eighteen months. On remaining counts it was ordered that imposition of sentence be suspended and this petitioner placed on active probation as of that date (R. 19).

Petitioner served said eighteen months sentence. In May, 1944, the probation officer at Shreveport petitioned the Court to require this petitioner to show cause why his probation should not be revoked for failure to make reports to the probation officer (R. 27), and on December 6, 1944, probation was revoked and sentence imposed of three years on the remaining counts of the indictment (R. 29). Petitioner escaped from jail at Shreveport and was indicted under the Federal Escape Act (R. 38). Plea of guilty was entered January 4, 1945, and sentence was imposed of one year and one day consecutively to the three-year sentence (A. 39, 40). Petitioner was duly committed to the United States Penitentiary, Leavenworth, Kansas (R. 42).

Petitioner filed in the United States District Court for the District of Kansas a petition for a writ of habeas corpus (R. 5-8) setting up that the five counts

charged a single offense; that each count refers to same date, same woman, same points of origin and destination, same means of transportation, namely, an automobile. Further, that the law does not authorize for a single offense a term of imprisonment followed by probation; that the three-year sentence was imposed after expiation for the offense and is void; and that petitioner having served the one-year sentence for escape, his further detention was unlawful. The verified petition alleged further that the verdict "guilty as charged" referred to the single offense shown by the evidence and that such verdict was a finding of guilt of a single offense. Response of the Warden (R. 8-10) contained denials, and included certified copies as follows: Mann Act indictment (R. 14-18), Judgment thereon (R. 18-19), Commitment on eighteen months sentence (R. 19), Petition to revoke probation filed May 19, 1944 (R. 26-27), Judgment revoking probation and sentence of three years (R. 28, 29), Commitment thereon (R. 29-31), Indictment, Judgment and Commitment for Escape (R. 38-42). No oral testimony was given.

The trial judge in Kansas, the Honorable Arthur J. Mellott, in a written opinion (R. 43-48) held that it was unnecessary to construe the indictment as petitioner's only remedy was to have appealed. The Tenth Circuit Court of Appeals affirmed the judgment of the trial court (R. 51-53) but gave a different reason, namely, that Count 2 stated a separate and distinct offense. *Bowker v. Hunter,* 158 F. 2d 854.

REASONS FOR GRANTING THE WRIT AND AUTHORITIES IN SUPPORT THEREOF.

1. Construction and application of Section 2 of the Mann Act, 18 U. S. Code 398, is involved. This Court will grant a review in such a case. *Cleveland v. United States,* 328 U. S. .., 91 L. Ed. 1, 67 S. Ct. 13; *United States v. Beach,* 324 U. S. 193, 89 L. Ed. 865; *Mortensen v. United States,* 322 U. S. 369, 88 L. Ed. 1337, 64 S. Ct. 1037. No court heretofore has held that charges of "transport and cause to be transported" and "obtain a form of transportation and transport" based on Section 2 of the Act, state more than a single offense. The statute is highly penal and it is of general importance that the Supreme Court pass on this question.

2. Petitioner is deprived of liberty without due process in violation of Fifth Amendment. When petitioner served in full the eighteen months sentence on Count 1 he paid for his offense. The Court had no power years thereafter to impose three-year sentence. *Re Bradley,* 318 U. S. 50, 63 S. Ct. 470, 87 L. Ed. 608; *Ex parte Lange,* 85 U. S. 163, 21 L. Ed. 872; *Roberts v. United States,* 320 U. S. 264, 64 S. Ct. 113, 88 L. Ed. 41; *Ex parte Nielson,* 131 U. S. 176, 185, 9 S. Ct. 672, 33 L. Ed. 118; *Bowen v. Johnston,* 306 U. S. 19, 24, 59 S. Ct. 442, 83 L. Ed. 455; *Miller v. United States,* 2 Cir., 147 F. 2d 372.

3. Transportation is the gist of the offense defined by the Mann Act. *Ellis v. United States,* 8 Cir. 138 F. 2d 612, *Robinson v. United States,* 10 Cir., 143 F. 2d 276. And the decision of the Tenth Circuit that several counts

drawn under Section 2, 18 U. S. Code 398, all referring to one transportation of one woman, state more than a single offense, is in conflict with those decisions.

4. The decision of the Tenth Circuit Court of Appeals conflicts generally with decisions of the several circuits interpreting the Mann Act. For example, the five counts in the present case all pertain to transportation by automobile and are therefore limited to Section 2 of the Mann Act, 18 U. S. Code 398. Each count refers to the same date, same woman transported, same means of transportation, same points of origin and destination. In *Roark v. United States,* 8 Cir. 17 F. 2d 570, 51 A. L. R. 870, Anno., page 875, the indictment contained four counts pertaining to transportation of the same woman from Texas to Colorado by common carrier, and the Court with considerable hesitancy held that two separate offenses were stated, eg. "transport or cause to be transported" under Section 2 (398) and "induced to go in interstate commerce" under Section 3 (399). Circuit Judge Kenyon dissented.

The decision of the Circuit Court of Appeals conflicts with the decision of the First Circuit in *Malaga v. United States,* 57 F. 2d 822.

The decision of the Circuit Court of Appeals conflicts with the decision of the Eighth Circuit in *Huffman v. United States,* 259 F. 35; decisions of the Ninth Circuit in *Suslak v. United States,* 213 F. 913, and *Tobias v. United States,* 2 F. 2d 361, in which cases several counts were treated as charging a single offense (see annotation, 51 A. L. R. 875).

5. The decision of the Circuit Court in the present case conflicts with the decision of the Eighth Circuit in *Lapage v. United States,* 146 F. 2d 536, 156 A. L. R. 965, 971, and the decision of the Supreme Court in *United States v. Kenofskey,* 243 U. S. 440, 37 S. Ct. 438, 61 L. Ed. 836, in holding that evidence sufficient to sustain the charge of "obtaining a form of transportation and transporting" would be wholly insufficient to sustain a charge of "transport or cause to be transported." The conduct in either instance can be characterized as bringing about transportation. In the *Kenofskey* case it was said that "cause" is a word of broad import and in its well known sense means to bring about.

6. The decision of the Tenth Circuit Court of Appeals in the present case conflicts with the rule established by the Supreme Court for determining single or separate offenses. The rule is stated in *Blockburger v. United States,* 284 U. S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306.

7. Decision of the Circuit Court conflicts with Supreme Court decision in *Ebeling v. Morgan,* 237 U. S. 625, 59 L. Ed. 1151, 35 S. Ct. 710. There the thing prohibited under 18 U. S. Code 312, was the injuring of "any mail bag". Several mail bags were cut and it was held that separate offenses were committed. But in the present case, the thing prohibited is "transportation" and there was only one transportation.

8. The decision of the Tenth Circuit in the present case subjects petitioner to a second punishment after he had fully served a valid sentence for the single offense.

The decision obviously is wrong and adds confusion to interpretation of the Mann Act. The statement of Circuit Judge Parker in *Short v. United States,* 98 F. 2d 614, 112 A. L. R. 969, Anno. 983, quoting Judge Evans, is particularly applicable here. There it was attempted to use two substantive offenses as basis of two conspiracy charges. It was said:

> "The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is practical, not a theoretical one."

9. Habeas corpus is available to determine right to discharge from unlawful imprisonment. *Bozza v. United States,* (Feb. 17, 1947), 328 U. S. .., 67 S. Ct. 645; *In re Bonner,* 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149. Habeas corpus resulted in review by the Supreme Court of similar question in *Ebeling v. Morgan,* 237 U. S. 625, 59 L. Ed. 1151, 35 S. Ct. 710.

10. Ruling of the trial court, District of Kansas, and considered but not decided by the Tenth Circuit Court, that habeas corpus cannot be used to obtain freedom from excessive sentence, citing *U. S. v. Hill,* 3 Cir., 71 F. 2d 906, and *Caballero v. Hudspeth,* 10 Cir., 114 F. 2d 545, is in conflict with the foregoing decisions of the Supreme Court; and decision of Fifth Circuit, *Sprague v. Aderholt,* 45 F. 2d 790; *Miller v. United States,* 147 F. 2d 372; and of the Eighth Circuit in *Biddle v. Thiele,* 11 F. 2d 235, and *Stoneberg v. Morgan,* 246 F. 98, 99.

11. Under the Federal Probation Law, 18 U. S. Code 724, a Federal District Court does not have authority in

sentencing for a single offense to impose a term of imprisonment followed by probation. Power to suspend imposition or execution of sentence and place on probation is statutory. *Roberts v. United States,* 320 U. S. 264, 64 S. Ct. 113, 88 L. Ed. 41; *Escoe v. Zerbst,* 295 U. S. 490, 79 L. Ed. 1566, 65 S. Ct. 818; *Trant v. United States,* 90 F. 2d 718. In *White v. Burke,* 10 Cir. 43 F. 2d 329, it was held that grant of power in the probation law to impose a fine and place defendant on probation, necessarily excludes the power to impose greater punishment, namely, a period of imprisonment followed by probation.

12. Petitioner having served the one year sentence and commitment for escape and the three year sentence being excessive, is estitled to be discharged from custody of the Warden. *Youst v. United States,* 151 F. 2d 666.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court direct to the United States Circuit Court of Appeals, Tenth Circuit, commanding said court certify and send to this Court a full and complete transcript of the record and of the proceedings of the said court in its case Docket No. 3397, Bert Charles Bowker, Appellant v. Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, Appellee, to the end that this cause be reviewed by this Court as provided for by the statutes of the United States; and that the judgment of said Tenth Circuit Court of Appeals in said cause be reversed by this

Court, and for such further relief as to this Court may seem proper.

BERT CHARLES BOWKER,
Petitioner,

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1367

BERT CHARLES BOWKER, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 51–53) is reported at 158 F. 2d 854. The opinion of the district court (R. 43–48) is not reported.

JURISDICTION

The judgment of the circuit court was entered January 15, 1947 (R. 53–54). On April 14, 1947, by order of Mr. Justice Rutledge, petitioner's time to file a petition for a writ of certiorari was extended to May 16, 1947. The petition was filed on

May 12, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether separate offenses were charged in two counts of an indictment for violations of the Mann Act, one alleging transportation of a woman in interstate commerce for the purpose of prostitution, and the other alleging the procuring of a vehicle by which the woman was transported in interstate commerce for purposes of prostitution.

STATUTE INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), commonly known at the Mann Act, provides:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist

in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT

In March 1940, an indictment in five counts was returned against petitioner in the United States District Court for the Western District of Louisiana, charging violations of Section 2 of the Mann Act (R. 14–18). The first count charged that on or about February 9, 1940, petitioner transported and caused the transportation of a woman in interstate commerce "via an automobile" for the purpose of prostitution and debauchery (R. 14–15); the second, that on or

about the same date he procured and aided and assisted in procuring a form of transportation in interstate commerce, i. e., an automobile, to be used by the same woman in going in interstate commerce for the purpose of prostitution and debauchery, and whereby the woman was so transported for such purposes (R. 15–16); the third, fourth, and fifth, that he transported and aided and assisted in transporting the woman in interstate commerce for different immoral purposes (R. 16–18). Petitioner was convicted and on June 21, 1940, he was sentenced to imprisonment for 18 months on the first count, but imposition of sentence on the other counts was suspended and he was placed on probation as of the date of the judgment, with the further provision that supervision begin at the expiration of his sentence (R. 18–19). Petitioner served the 18 months' sentence on the first count (R. 22, 44). On December 6, 1944, his probation was revoked, and he was sentenced to imprisonment for three years on the remaining counts (R. 28–29, 36). On the day that this sentence was imposed, he escaped from custody (R. 31), and he was subsequently sentenced for that offense to imprisonment for one year and one day, to run consecutively to the three-year sentence imposed on December 6, 1944 (R. 39–40).

In November 1945, petitioner filed a petition for a writ of habeas corpus in the United States

District Court for the District of Kansas, in which he alleged that all five counts of the Mann Act indictment charged but one offense; that service of the eighteen months' sentence imposed on the first count constituted full service of the sentence for that offense; and hence that the court had no power to impose the three-year sentence on the remaining counts of the indictment. He further alleged that he had been incarcerated long enough to have served the one-year sentence imposed for escape, and that he was therefore entitled to be discharged from custody. (R. 5–8.) After a hearing, the district court discharged the writ theretofore issued and dismissed the petition, holding that petitioner could not, on habeas corpus, challenge the right of the sentencing courts to impose separate sentences on the various counts of the Mann Act indictment (R. 43–48). On appeal, the judgment of the district court was affirmed (R. 53), the circuit court of appeals holding that since the first and second counts of the indictment charged separate offenses, the additional, single sentence imposed on counts 2, 3, 4, and 5 was proper (R. 51–53).

ARGUMENT

Petitioner renews here the contention urged before both courts below that all five counts of the Mann Act indictment charged but one offense (Pet. 7–10), and he argues from that premise that the sentencing court was without power to impose

both a prison sentence and probation for that one offense (Pet. 10–11). His contention necessarily fails if more than one offense was alleged by the separate counts of the indictment.

Section 2 of the Mann Act provides in separate clauses for the punishment of one who transports a woman in interstate commerce for the purpose of prostitution or debauchery, and of one who procures "any ticket or tickets, or any form of transportation * * * to be used by any woman or girl in interstate or foreign commerce, * * * in going to any place for the purpose of prostitution or debauchery, * * * whereby any such woman or girl shall be transported in interstate or foreign commerce." The indictment charged in the first count that petitioner transported a woman in interstate commerce for the purpose of prostitution and debauchery, and in the second count that he procured an automobile to be used by the woman in going in interstate commerce for the purpose of prostitution and debauchery. A person can procure transportation for a woman and not transport her himself, and, conversely, he may transport her without having procured the means of transportation. Hence, whether the separability of the offenses be judged by the principle that Congress may punish each step in a transaction (*Albrecht* v. *United States,* 273 U. S. 1), or by the test that each offense must contain an element which is not present in the other

(*Blockburger* v. *United States,* 284 U. S. 299), the first and second counts of the indictment charged separate offenses.

None of the cases relied upon by the petitioner (Pet. 8–10) deal with the precise problem here involved. It has been held that the allegation of different purposes for the transportation of the woman does not serve to divide the one transportation into several offenses. *Malaga* v. *United States,* 57 F. 2d 822 (C. C. A. 1). On this basis, the last three counts do not charge separate offenses. But, since the single three-year sentence imposed on counts two to five is less than the five-year maximum, which could have been imposed on the second count alone, the failure of the last three counts to charge separate offenses is immaterial.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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